

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>REGIONAL SPECIALTY FOOD MARKETING &amp; DISTRIBUTION SERVICES, INC.</b>	:	DETERMINATION
	:	DTA NO. 815979
for Revision of a Determination or for Refund of Mortgage Recording Tax under Article 11 of the Tax Law with Reference to an Instrument Recorded on December 13, 1996.	:	

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Petitioner, Regional Specialty Food Marketing & Distribution Services, Inc., S. 5095 Southwestern Boulevard, Hamburg, New York 14075, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on December 13, 1996.

On January 30, 1998 and February 11, 1998, respectively, petitioner by its representative, William J. Trask, Esq., and the Division of Taxation by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq. of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by June 12, 1998, which commenced the six-month period for the issuance of this determination. After review of the evidence and arguments presented, Thomas C. Sacca, Administrative Law Judge, renders the following determination.

***ISSUE***

Whether petitioner is entitled to a refund of mortgage recording tax paid to the Erie County Clerk's Office in conjunction with a mortgage recorded on December 13, 1996.

***FINDINGS OF FACT***

1. Petitioner, Regional Specialty Food Marketing & Distribution Services, Inc., recorded a Building Loan Mortgage and Security Agreement (the “first building loan mortgage”) with the Erie County Clerk’s Office on December 13, 1996. The terms of the first building loan mortgage indicated that petitioner (mortgagor) was the fee owner of certain real property located in the Town of Hamburg, New York. The terms of the first building loan mortgage also stated that, pursuant to the provisions of a separate Building Loan Agreement, petitioner had obtained a building loan with respect to such real property in the amount of \$585,755.04 from Marine Midland Bank (mortgagee). This building loan was memorialized in a promissory note executed by petitioner on or about December 13, 1996.

2. Petitioner agreed to secure the payment of the promissory note to Marine Midland by, among other things, the execution and delivery of the first building loan mortgage. In addition, the first building loan mortgage provided that petitioner was responsible for filing, registering or recording the first building loan mortgage (and any other security instrument creating a lien on the property) and paying all filing, registration or recording fees and all Federal, State, county and municipal taxes arising out of or in connection with the execution and delivery of the first building loan mortgage. Accordingly, petitioner recorded the first building loan mortgage and remitted the appropriate amount of mortgage recording tax due under Tax Law § 253 to the Erie County Clerk’s Office (\$5,858.00) on December 13, 1996.

3. On or about March 6, 1997, petitioner, Marine Midland Bank and the Town of Hamburg Industrial Development Agency (the “Hamburg IDA”) executed a document entitled “First Amended and Restated Building Loan Mortgage and Security Agreement” (the “second

building loan mortgage”)<sup>1</sup>. Contrary to the terms of the first building loan mortgage, this document indicated that the Hamburg IDA was the fee owner of the property previously described and covered by the first building loan mortgage, and that petitioner was the lessee of such property.

4. Similar to the terms of the first building loan mortgage, the terms of the second building loan mortgage stated that, pursuant to the provisions of a separate Building Loan Agreement, petitioner had obtained a building loan with respect to the property in the amount of \$585,755.04 from Marine Midland Bank. According to the second building loan mortgage, the loan was memorialized in a promissory note dated December 1, 1996. Petitioner allegedly agreed to secure the payment of the promissory note to Marine Midland by, among other things, the execution and delivery of the second building loan mortgage.

5. Attached to the second building loan mortgage is an affidavit of the general counsel for the Hamburg IDA. The affidavit stated that the second building loan mortgage is exempt from mortgage recording tax pursuant to General Municipal Law § 874. As a result of the exemption, the affidavit requested that the Erie County Clerk’s Office accept the recording of the mortgage without payment of the mortgage recording tax. According to the record page of the Erie County Clerk’s Office, no mortgage recording tax was collected upon the recording of the second building loan mortgage.

6. Petitioner submitted a Mortgage Recording Tax Claim for Refund (form MT-15.1) in the amount of \$5,858.00 to the Division of Taxation (the “Division”) on March 24, 1997. The basis for petitioner’s refund claim was that there had been a “good faith misunderstanding and/or

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<sup>1</sup>The first page of this document states that it is “dated as of December 1, 1996,” but the signature pages indicate that it was actually signed on March 6, 1997.

oversight” by petitioner, whereby it had failed to communicate to its attorney or Marine Midland Bank the fact that the building project on the property had been induced by the Hamburg IDA pursuant to an inducement resolution that had been adopted on June 25, 1996. Petitioner claimed that the “error” had since been corrected through the execution and recording of a “correcting instrument” (i.e., the second building loan mortgage).

7. The Division disallowed petitioner’s refund claim via a two-page Notice of Disallowance dated April 21, 1997. The refund denial letter stated, in pertinent part, that:

Petitioner voluntarily presented a mortgage to the Erie County Clerk in proper form which reflected a mortgage indebtedness of \$585,755.04. The mortgage recording tax was properly computed based on the debt shown on the mortgage presented and tax of \$5,858.00 was paid at recording. As noted earlier, the mortgage recording tax is imposed upon the privilege of recording a mortgage and here petitioner received the benefits and privileges associated with the recording of the mortgage.

In addition to the foregoing, the denial letter notes that “[t]he mortgagee, Marine Midland Bank, is not exempt from mortgage recording tax. Accordingly, the proper mortgage recording tax was collected at recording.” The Division concluded that since the choice of form for the mortgage did not rest with the tax authorities but with the taxpayer, it is petitioner that must bear the consequences of choosing a form ~~CONCLUSIONS OF LAW~~ mortgage that was taxable.

A. As relevant to this proceeding, when a mortgage on real property situated within New York is recorded, Tax Law §§ 253 and 253-a impose a tax upon recordation. Mortgage is defined in Tax Law § 250(2) as “every mortgage or deed of trust which imposes a lien or affects the title to real property, notwithstanding that such property may form a part of the security for the debt or debts secured thereby.”

Tax Law § 258 provides for the enforcement and collection of the tax as follows:

[n]o mortgage of real property shall be recorded by any county clerk or register, unless there shall be paid the taxes imposed by and as in this article provided. No mortgage of real property which is subject to the taxes imposed by this article shall be released, discharged of record or received in evidence in any action or proceeding, nor shall any assignment of or agreement extending any such mortgage be recorded unless the taxes imposed thereon by this article shall have been paid as provided in this article.

Petitioner in this case was required to pay a mortgage recording tax on the December 13, 1996 mortgage because the recording officer determined that the document filed was a mortgage imposing a lien on real property.

B. Since petitioner seeks the benefit of the Hamburg IDA exemption from the mortgage recording tax<sup>2</sup>, which, like all tax exemptions is strictly and narrowly construed, the burden is on petitioner to demonstrate that it comes within the reach of the exemption (*see, Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715, *lv denied* 37 NY2d 708, 375 NYS2d 1027; *Dental Society of the State of New York v. New York State Tax Commn.*, 110 AD2d 988, 487 NYS2d 894, *affd* 66 NY2d 939, 498 NYS2d 797).

The mortgage recording tax is not a tax on property but rather is imposed upon the privilege of recording a mortgage; the underlying debt is the basis for computation (*Matter of S. Silberblatt, Inc. v. State Tax Commn.*, 5 NY2d 635, 186 NYS2d 646, *cert denied* 361 US 912, 4 L Ed 2d 183; *Matter of Citibank, N.A. v. State Tax Commn.*, 98 AD2d 929, 470 NYS2d 920). The circumstances under which a mortgage may be exempt from the payment of the mortgage recording tax are delineated in Tax Law §§ 252 and 252-a. Section 252 provides, in relevant part, as follows:

No mortgage or real property situated within this state shall be exempt . . . from the taxes imposed by this article by reason of anything contained in any other

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<sup>2</sup>*See* General Municipal Law § 874.

statute, except as provided in [§ 339-ee] of the real property law, or by reason of any provision in any private act or charter which is subject to amendment or repeal by the legislature, or by reason of non-residence within this state or for any other cause, except that mortgages of real property situated within this state transferred, assigned or made to Home Owners' Loan Corporation, a corporation created under an act of congress, known as home owners' loan act of [1933], or to a [sic] agricultural credit association or federal home loan bank, shall be exempt, and said corporation or institution owning any debt or obligation secured by mortgage of real property situated within this state, shall be exempt . . . and except that mortgages of real property situated within this state executed, given or made prior to [June 1, 1934] by any public benefit corporation created under the laws of this state for the purpose of maintaining and operating a public park and public recreation center shall be exempt, and any person or corporation owning any debt or obligation of any such public benefit corporation secured by such a mortgage of its real property situated within this state, shall be exempt . . . and except that mortgages of real property situated within this state which are executed, given or made subsequent to [June 1, 1934] and which are substituted for other mortgages a part of and in compliance with a plan of reorganization pursuant to the provisions of [§ 77-b] of the federal bankruptcy act, are and shall be exempt from taxes imposed by this article . . . and any person or corporation owning any debt or obligation secured by such a mortgage of real property situated within this state is and shall be exempt . . . and except that mortgages of real property situated within this state which are executed, given or made by a railroad corporation during the first nine years of its existence as such are and shall be exempt from the taxes imposed by this article and any person or corporation owning any debt or obligation secured by such a mortgage of real property situated within this state is and shall be exempt . . .<sup>3</sup>

Section 252-a further provides for two additional exemptions from the mortgage recording tax . This section provides that both mortgages given to secure obligations incurred and given pursuant to the provisions of section 6-a of the Banking Law and reverse mortgages conforming to the provisions of section 280 or section 280-a of the Real Property Law securing obligations of mortgagors or exempted therefrom pursuant to section 280(4) or section 280-a(4) of the Real Property Law shall be exempt from any tax or fee imposed by Article 11.

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<sup>3</sup>In addition to the statutory exemptions listed in section 252, the immunity of public bodies or the State from this tax independent of the statutory exemptions has long been established (*see, Matter of City of New York v. Tully*, 88 AD2d 701, 451 NYS2d 265, *lv denied* 57 NY2d 606, 455 NYS2d 1025).

It is without question that none of the foregoing statutory exemptions apply to the first building loan mortgage at issue in this matter. However, petitioner asserts that the first building loan mortgage should be exempt from the mortgage recording tax because it was “corrected” and “replaced” by the second building loan mortgage, which was exempt from the mortgage recording tax.

C. Petitioner claims that as the second building loan mortgage was exempt from the mortgage recording tax, and the second mortgage was intended to replace the first building loan mortgage, the first building loan mortgage should now be considered exempt from the mortgage recording tax. As a result, petitioner seeks to recover the \$5,858.00 in mortgage recording tax paid upon the recording of the first building loan mortgage. The Division asserts that petitioner’s position is not supported by any statutory authority or case law and is, in fact, contrary to case law developed under the mortgage recording tax.

At the time the first building loan mortgage was presented for recording at the Erie County Clerk’s Office, no credit for mortgage recording tax was claimed. The parties to the first building loan mortgage were listed as petitioner (mortgagor) and Marine Midland Bank (mortgagee), both of whom are private entities. It is well settled that when the parties involved in the transaction at the time of the recording are private concerns, mortgage recording tax is due (*Matter of S.S. Silberblatt, Inc. v. State Tax Commn., supra*). Thus, the mortgage recording tax was properly collected upon the recording of the first building mortgage loan on December 13, 1996.

D. The recording of the second building loan mortgage did not alter the facts surrounding the recording of the first building loan mortgage. In a case analogous to the present matter, the Appellate Division in *Matter of C.E. Towers Company v. State Tax Commn.* (135 AD2d 976,

522 NYS2d 384) held that when the parties involved in the transaction at the time of the recording of the mortgage are private concerns the mortgage recording tax is due, notwithstanding eventual ownership of the debts by a governmental instrumentality pursuant to a previous agreement. The court in *C.E. Towers Company* relied on the decision of the New York State Court of Appeals in *S.S. Silberblatt, Inc. (supra)* for its conclusion. In *C.E. Towers Company*, the issue arose when mortgage recording tax was paid by the taxpayer in connection with the recording of a construction loan mortgage the taxpayer obtained from Chase Manhattan Bank to erect an office building. Prior to the recording, the State Comptroller, as trustee of the Common Retirement Fund of the New York State Employees' Retirement System, issued a commitment to the taxpayer to make a first mortgage loan on the property upon completion of the building. Following the recording of the mortgage, and in accordance with that commitment, the Retirement System purchased the construction loan and Chase assigned to it the building loan mortgage. The taxpayer subsequently sought a refund of the mortgage recording tax on the premise that even before the tax was paid the Retirement System, a tax-exempt entity, was the "end lender" destined to hold the mortgage. The Court disagreed, holding that the recording of the mortgage was properly subject to the imposition of the mortgage recording tax notwithstanding the fact that its ultimate assignment to an exempt organization was previously contemplated in the Retirement System's mortgage commitment.

The same rationale applies herein. The parties involved in the transaction at issue at the time of recording of the first building loan mortgage were private concerns and therefore the mortgage recording tax was due. This was true notwithstanding that eventual ownership of the debts by a government entity occurred pursuant to a previous agreement, the inducement resolution of the Hamburg IDA (*see, Matter of S.S. Silberblatt, Inc. v. State Tax Commn.*,



*supra*; *Matter of C.E. Towers Company v. State Tax Commn.*, *supra*). At the time of the recording of the first building loan mortgage, petitioner received the benefits and privileges associated with such recording, and the mortgage recording tax was properly collected.

E. Petitioner's argument that its intent should govern has previously been addressed by the Tax Appeals Tribunal in *Matter of Weiss* (Tax Appeals Tribunal, October 13, 1994). In the *Weiss* matter, the issue arose with the taxpayer's erroneous and unintended discharge of all properties from the liens imposed by their Union Savings Bank mortgages before recording a consolidation agreement. With respect to the issue of intent, the Tribunal stated that:

While petitioners argue intent matters for purposes of the section 255 exemption, they have not directed us to any cases which support this assertion. Moreover, in the course of our research, we have not found any cases supporting their position. Due to petitioners' failure to show that their intent to qualify the subsequent mortgages as supplemental mortgages entitles them to the section 255 exemption, we disallow their claim to the exemption on this basis.

The Tribunal's reasoning applies here as well. Although petitioner may have intended to record the first building loan mortgage showing that the Hamburg IDA was the fee owner of the property and that petitioner was merely the lessee of such property, the fact of the matter is that petitioner voluntarily presented the mortgage to the Erie County Clerk's Office in proper form with a request that the mortgage be recorded. The mortgage recording tax was properly computed and paid upon the recordation of the mortgage. Whether or not petitioner intended to record the mortgage in such form is irrelevant. As noted earlier, the mortgage recording tax is imposed upon the privilege of recording a mortgage, and here petitioner received the benefits and privileges associated with the recordation of the mortgage.

F. The petition of Regional Specialty Food Marketing & Distribution Services, Inc. is denied and the Division of Taxation's denial of the refund claim is sustained.

DATED: Troy, New York  
October 15, 1998

/s/ Thomas C. Sacca  
ADMINISTRATIVE LAW JUDGE